Id. at 13. Thus, SchoolCraft apparently argues that, because the air samples allegedly did not detect airborne asbestos particles, there was no violation of the wetting work-practice requirements, even though Mr. Adams observed dry RACM that had recently been stripped and had not yet been collected and contained or treated for disposal. SchoolCraft also argues that "the actual wetting of the material was Seneca's responsibility, not SchoolCraft." *Id.* at 14. We disagree with both of these arguments.

First, the Presiding Officer correctly rejected SchoolCraft's arguments regarding the air sampling, holding that the complainant is not required to prove that asbestos has actually become airborne in order to show that RACM was not adequately wet. Decision Following Remand at 7 (citing 40 C.F.R. § 61.141). This holding is in accordance with the holding in *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231, 234 (D. Kan. 1990), where the court stated as follows:

> Defendant has not identified and we are not aware of any other court which has held dust emissions a prerequisite to finding that friable asbestos materials were inadequately wetted. In cases involving alleged violations of the NESHAP for asbestos, courts have routinely relied on the observations of inspectors to determine whether asbestos was adequately wetted. *See, e.g., United States v. Sealtite Corp.*, 739 F. Supp. 464, 467 (E.D. Ark. 1990); *United States v. Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013, 1022 (D.N.J. 1988); *United States v. Ben's Truck & Equip.*, No. 84-1672 (E.D. Cal. May 12, 1986). The *Sealtite* court, for example, did not require the government to prove that there were emissions, but only that the asbestos was not adequately wet. State inspectors' observations that asbestos containing waste materials had not been adequately wetted was enough to hold defendant liable as a matter of law. *United States v. Sealtite*, 739 F. Supp. at 469.

This Board has similarly held that "to establish a violation of the adequately wet requirements, it is not essential for the Agency to prove that emissions occurred." *In re Echevarria,* 5 E.A.D. 626, 641 (EAB 1994), citing *MPM Contractors, supra.* The Board has also held that "the testimony of a compliance inspector regarding personal observations is sufficient to establish whether RACM has been adequately wetted." *In re Ocean State Asbestos Removal, Inc.*, CAA Appeal Nos. 97-2 and 97-5, slip op. at 13 (EAB, March 13, 1998), 7 E.A.D. __; *see also Echevarria,* 5 E.A.D. at 639-40 (same). The wetting work practice standard and the regulatory definition of "adequately wet" focus on whether asbestos releases *can* occur, not whether they actually did occur. The definition of "adequately wet" specifically states that the RACM must be mixed or penetrated with liquid "to *prevent* the release of particulates." 40 C.F.R. § 61.141 (emphasis added). The absence of asbestos particles in the air samples cannot conclusively show whether the RACM was adequately wet "to prevent" the release of asbestos; it can only show that releases were not detected at the times and locations of the sampling. Accordingly, the testimony of Mr. Adams in this case that he saw recently stripped, dry RACM was sufficient evidence to establish that the RACM was not adequately wet to prevent releases of asbestos particles.

Second, the Presiding Officer properly rejected SchoolCraft's contention that it did not have responsibility for ensuring that the RACM was adequately wet. In *SchoolCraft I,* we held that "SchoolCraft had the requisite supervisory authority over the renovation operation to be considered an 'operator' within the meaning of the asbestos NESHAP." *SchoolCraft I*, slip op. at 25. Although SchoolCraft's status as an "operator" is based upon supervisory authority established by SchoolCraft's contractual relationship with Centerville, *id.* at 18-25, the scope of SchoolCraft's responsibilities for ensuring compliance with the regulations is not governed by the *contractual* terms. Instead, once a person acquires the status of "operator," the *regulations* impose upon that person certain legal duties, including the duties at issue in Counts III and IV to adequately wet RACM during removal and to ensure that the RACM remains adequately wet. Those duties imposed by law cannot be

removed by contractual arrangements. Thus, SchoolCraft cannot rely upon Seneca's contractual agreement to perform the asbestos removal work to show that SchoolCraft should not be held liable for the failure to adequately wet RACM.[9] For these reasons, we uphold the findings of liability on Counts III and IV.

3. *Count V: Whether the On-Site Representative's Certification of Training Was Posted as Required by 40 C.F.R. § 61.145(c)(8)*

Count V of the Complaint charged SchoolCraft with violating the requirement that evidence of the required on-site representative's training be posted and made available for inspection at the renovation site. In particular, the Asbestos NESHAP requires as follows:

> [N]o RACM shall be stripped, removed, or otherwise handled or distributed at a facility regulated by this section unless at least one on-site representative, such as a foreman or management-level person or other authorized representative, trained in the provisions of this regulation and the means of complying with them, is present. * * * *Evidence that the required training has been completed shall be posted and made available for inspection by the Administrator at the demolition or renovation site.*

40 C.F.R. § 61.145(c)(8) (emphasis added).

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[9]As we noted in *SchoolCraft I*, the evidence regarding Seneca's contractual responsibilities may establish that Seneca also was an "operator" of the activity. *SchoolCraft I*, slip op. at 20, 23-24 n.19 (observing that SchoolCraft conceded that there may be more than one "operator" of a given asbestos removal activity). As noted by the Presiding Officer, the Asbestos NESHAP places responsibility for compliance on "each" owner and operator. Decision Following Remand at 5 n.2. Thus, each operator may be held liable for the violations.

In the present case, the Presiding Officer found that "there was no on-site copy of a site representative's Ohio Department of Health certificate demonstrating training in the asbestos NESHAP." Decision Following Remand at 8. Although the training certification was not located on-site, the Presiding Officer found that "Seneca did have its site supervisor's Ohio Department of Health certificate demonstrating training at its off-site office and, at Mr. Adams' request, it was sent to RAPCA by facsimile on June 30, 1992." *Id.* However, because the certification of training was not located on-site as required by the regulations, the Presiding Officer found that "Respondent's failure to post evidence of an on-site representative's training * * * at the Cline Elementary School renovation is a violation of 40 C.F.R. § 61.145(c)(8)." Decision Following Remand at 8.

On appeal, SchoolCraft does not challenge the finding that, on the day of the inspection, the training certificate for the supervisor of the asbestos activity was not located on-site. Instead, SchoolCraft argues that because the training certificate for the on-site supervisor was telefaxed to the inspector on the day of the inspection and because there is no evidence that the inspector was inconvenienced, "[t]his is certainly substantive and material compliance with this regulation." SchoolCraft's Brief at 16. SchoolCraft also argues that the contract with Seneca obligated Seneca to employ the asbestos abatement specialist to supervise the work and that, therefore, Seneca violated the regulation, not SchoolCraft. *Id.* at 16-17. We disagree.

Although the purpose of this regulation may be to prevent inconvenience to the inspector, the regulation is not drafted as an inconvenience-based standard. Instead, it is drafted as a bright-line rule requiring that the certification be located on-site. Thus, because the training certification was not located on-site on the day of the inspection, the rule was violated and SchoolCraft, as an operator of the renovation project, is liable for that violation. SchoolCraft's arguments go more appropriately to the amount of the penalty assessed and, in this context, we note that the Region reduced its proposed penalty for this violation by $10,000 to take into account the lower "gravity" of this violation.

Decision Following Remand at 11. We uphold the Presiding Officer's finding of liability for Count V of the Complaint.

B. *Penalty Issues*

Section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1), authorizes the assessment of civil penalties of up to $25,000 per day for each violation of the Clean Air Act. CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1). The statute also specifies general criteria that must be considered by the Agency in assessing a civil penalty.[10]

In addition, pursuant to 40 C.F.R. § 22.27(b), the presiding officer must consider any civil penalty guidelines or policies issued by the Agency. The Agency has prepared a general penalty policy applicable to violations of the Clean Air Act, known as the Clean Air Act Stationary Source Civil Penalty Policy of October 25, 1991 (the "General Penalty Policy"). Attached to the General Penalty Policy as Appendix III, Asbestos Demolition and Renovation Civil Penalty Policy (revised May 5, 1992), are the specific guidelines for penalties assessed for violations of the Asbestos NESHAP (the "Asbestos Penalty Policy").

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[10]The statutory penalty criteria in relevant part are as follows:

> In determining the amount of any penalty to be assessed under this section * * *, the Administrator * * * shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * *, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

CAA § 113(e), 42 U.S.C. § 7413(e).

We have generally held that, while a presiding officer must consider the Agency's official penalty policy, in any particular instance the presiding officer may depart from the Agency's penalty policy as long as the reasons for the departure are adequately explained. *In re DIC Americas, Inc.*, 6 E.A.D. 184, 190 n.10 (EAB 1995); *In re Pacific Refining Company*, 5 E.A.D. 607, 612 (EAB 1994); *In re A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402, 414 (CJO 1987).

In the present case, the Region proposed a total penalty of $20,000 for the five violations alleged in Counts I through V of the Complaint. The proposed penalty was allocated among the separate violations as follows:

Counts I and II	$ 1,000
Count III	$ 4,000
Count IV	$10,000
Count V	$ 5,000

Decision Following Remand at 9.[11] The Region's proposed penalty was calculated pursuant to the guidance of the Asbestos Penalty Policy. *Id.* After extensively discussing and summarizing the evidence in this case regarding the appropriate penalty and analyzing that evidence within the framework of the Asbestos Penalty Policy, the Presiding Officer held that "Complainant's proposed penalty assessment in this case is reasonable and appropriate; it should result in deterring Respondent, and persons providing the same service to schools, from violating the NESHAP rules." The Presiding Officer, therefore, assessed the penalty proposed by the Region of $20,000 in the aggregate for SchoolCraft's five violations of the Asbestos NESHAP.

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[11]The penalty proposed by the Region took into account the fact that SchoolCraft was not the only operator. *See* Decision Following Remand at 12-13 (noting that the proposed penalty of $20,000 was significantly less than the penalty of $37,000 that would have been recommended had SchoolCraft been the only operator).

On appeal, SchoolCraft argues that the penalty assessed by the Presiding Officer is "unsupported by the record and in violation of the statutory criteria." SchoolCraft's Brief at 17. SchoolCraft first emphasizes that the original presiding officer opined, even though he did not reach the issue, that no penalty should be assessed. *Id.*[12] SchoolCraft also quotes from our remand opinion in *SchoolCraft I*, where we stated that "'there may be some merit to the Presiding Officer's conclusion that the Region's proposed penalty assessment against SchoolCraft appears high when compared to the amount ultimately assessed against Seneca.'" *Id.* at 18, quoting *SchoolCraft I* at 27.[13] Noting (1) that the penalty assessed by the Presiding Officer against SchoolCraft of $20,000 is "virtually identical to the entire payment

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[12]Although he dismissed the complaint against SchoolCraft without finding liability, ALJ Head stated that even if liability were found, he would impose no penalty. He explained that no penalty would be assessed because it was Seneca who "was responsible on a substantive basis for the violations charged against SchoolCraft." Initial Decision at 30.

[13]In *SchoolCraft I*, we stated in full as follows:

> While there may be some merit to the Presiding Officer's conclusion that the Region's proposed penalty assessment against SchoolCraft appears high when compared to the amount ultimately assessed against Seneca, we have serious doubts about the Presiding Officer's decision that no penalty at all would be warranted if SchoolCraft is found liable. However, as we are remanding this matter to the Presiding Officer for a determination of whether the Region met its burden of establishing that the violations alleged in the complaint occurred, we need not reach the penalty issue at this time.

SchoolCraft I at 27. This full quote shows that our focus in *SchoolCraft I* was upon the questionable basis for the original presiding officer's dicta as to a zero penalty amount. While we recognized that there might be some merit to SchoolCraft's contention, we did not at that time have the Region's penalty analysis before us and explicitly did not reach the issue of the appropriate penalty. We now have the benefit of both the Region's analysis and the Presiding Officer's thoughtful decision.

to SchoolCraft" of approximately $22,000, (2) that Seneca, which was paid over $300,000 by Centerville, settled its liability by agreeing to pay a civil penalty of $55,000, and (3) that Centerville paid no penalty, SchoolCraft argues that the Presiding Officer's penalty assessment is not appropriate under the statutory criteria. *Id.* at 17-19, 21. SchoolCraft also identifies several specific alleged errors in the Presiding Officer's penalty assessment, including that its alleged good faith was not considered. SchoolCraft's Brief at 18-21.

The applicable regulation confers discretion on us to increase or decrease the civil penalty assessed by the Presiding Officer. 40 C.F.R. § 22.31(a). *See also, Pacific Refining,* 5 E.A.D. at 612. However, we have held that when the Presiding Officer assesses a penalty that falls within the range of penalties provided in the penalty guidelines, the Board generally will not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty. *Pacific Refining,* 5 E.A.D. at 613; *In re Ray Birnbaum Scrap Yard,* 5 E.A.D. 120, 124 (EAB 1994). In this case, the penalty assessed by the Presiding Officer falls within the range of penalties suggested by the Asbestos Penalty Policy as described at pages 9 through 15 of the Decision Following Remand.[14] The Presiding Officer's analysis is both thorough and well reasoned. Thus, absent a showing of abuse of discretion or clear error, we are disinclined to substitute our judgment for that of the Presiding Officer.

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[14]The Region's proposed penalty and its analysis, which was adopted by the Presiding Officer, provided SchoolCraft with reductions in the amount of the penalty that would not have been warranted had the guidance of the Asbestos Penalty Policy been strictly followed. In particular, the Presiding Officer noted that while the Asbestos Penalty Policy determines the gravity of the violation based upon the total amount of asbestos involved in the whole operation, here the Region proposed the gravity component of the penalty by reference only to the amount of RACM cited in the violation. Decision Following Remand at 10. The Presiding Officer observed that "[i]n this regard Complainant's assessment varies from the asbestos policy to Respondent's benefit." *Id.*

SchoolCraft has not shown that the Presiding Officer abused his discretion or committed any clear error in his analysis. We begin our analysis by first noting the seriousness of these violations due to the risk to human health posed by exposure to airborne asbestos. 38 Fed. Reg. 8,820 (Apr. 6, 1973) (preamble to original asbestos NESHAP). Numerous courts have recognized the seriousness of exposure to asbestos fibers. *See, e.g., Environmental Encapsulating Corp., Central Jersey Coating, Inc., v. City of New York*, 855 F.2d 48 (2d Cir. 1988) ("Exposure to airborne asbestos fibers -- often one thousand times thinner than a human hair -- may induce several deadly diseases: asbestosis, a nonmalignant scarring of the lungs that causes extreme shortness of breath and often death; lung cancer; gastrointestinal cancer; and mesothelioma, a cancer of the lung lining or abdomen lining that develops 30 years after the first exposure to asbestos and that, once developed, invariably and rapidly causes death."); *Reserve Mining Co. v. Environmental Protection Agency,* 514 F.2d 492, 508-509 n.26, *modified*, 529 F.2d 181 (8th Cir. 1975); *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231 (D. Kan. 1990); *United States v. Tzavah Urban Renewal Corp.*, 696 F. Supp. 1013 (D.N.J. 1988). Because exposure to airborne asbestos poses such a serious risk to human health, violations of the regulations set forth in the Asbestos NESHAP, which are intended to reduce the potential for such exposure, must be considered potentially serious violations of the Clean Air Act, which can warrant a substantial penalty.

In this case, SchoolCraft has been found liable for violations of the Asbestos NESHAP, which relate to dry stripping of RACM from the facility and the failure to ensure that the RACM remains adequately wet. Most of the assessed penalty relates to these violations. Because "[w]etting to prevent the release of particulates is the primary method of controlling asbestos emissions during demolition or renovation work," *In re Echevarria,* 5 E.A.D. 626, 633 (EAB 1994), these violations are particularly serious.

SchoolCraft argues, however, that it should not be assessed a substantial penalty because it did not do the work that is regulated by the

Asbestos NESHAP and because Seneca had the responsibility for compliance with the work practice requirements. SchoolCraft's Brief at 22-23. These arguments must be rejected because SchoolCraft had a substantial supervisory role, with authority to direct Seneca's work, including its compliance with the Asbestos NESHAP. Centerville hired SchoolCraft to prepare the specifications for the Cline Elementary asbestos abatement project. *SchoolCraft I* at 4. Those specifications provided SchoolCraft with, among others, the following supervisory powers: SchoolCraft could direct the number of shifts worked during the project; it could discharge the contractor's employees if found to be incompetent or detrimental to the project; its approval was required for the contractor's construction procedure and schedule; and it could halt the abatement work in the event that the contractor was not complying with contract specifications or applicable regulations. *Id.* at 5. Thus, although Seneca was responsible under its contract with Centerville to perform the asbestos abatement work, SchoolCraft had the authority of a supervisor to ensure that the work was performed in compliance with the Asbestos NESHAP. It is therefore appropriate that a substantial penalty be assessed against SchoolCraft for the violations that occurred. Moreover, in this regard, we note that the penalty proposed by the Region, and assessed by the Presiding Officer, did take into account the fact that SchoolCraft was not the only operator. *See supra* notes 6 and 11 (proposed penalty of $20,000, rather than $37,000 had SchoolCraft been the only operator).

SchoolCraft's arguments regarding the proportionality of the penalty assessed against SchoolCraft when compared to the penalties assessed against Seneca and the lack of penalty assessed against Centerville do not show clear error or abuse of discretion. We have held that "'[g]enerally speaking, unequal treatment is not an available basis for challenging agency law enforcement proceedings.'" *In re Spang & Co.*, 6 E.A.D. 226, 242 (EAB 1995), quoting Koch, 1 *Administrative Law and Practice* § 5.20 at 361 (1985); *see also In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 627 (CJO 1991) (holding that information regarding penalties assessed in other cases does not have "significant probative value" regarding the appropriateness of the penalty

proposed in the present case). Indeed, the Supreme Court has held that "[t]he employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187, *rehearing den'd*, 412 U.S. 933 (1973). Moreover, where the other proceedings involved prosecutorial discretion in settlement and in the decision to bring an action, as was the case here with Seneca and Centerville, an inquiry into such matters is inappropriate. *See, e.g., In re Briggs & Stratton Corp.*, 1 E.A.D. 653, 666 (JO 1981) ("[Respondent] seeks to compare the penalties assessed by the presiding officer after a hearing with penalties assessed after negotiation with the enforcement staff. Such comparisons are difficult, if not impossible, to make."). The Presiding Officer also correctly observed that "the penalty was calculated in consideration of the gravity of the violations," and it would not be appropriate to reduce the gravity-based penalty in consideration of the relatively smaller profit earned by SchoolCraft as compared to Seneca -- the seriousness of the violation warrants a substantial penalty. Decision Following Remand at 15.

SchoolCraft's other arguments as to alleged errors in the penalty analysis also do not establish any clear error or abuse of discretion.[15] The record does not show that the omission of a penalty reduction for

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[15]SchoolCraft also contends that the Presiding Officer erred in finding that SchoolCraft's income is derived from promising clients that it will ensure that they are in compliance with the NESHAP regulations. SchoolCraft's Brief at 22-23. Reversal of this finding, however, would not change the penalty determination as it was offered as only one alternative reason for not reducing the gravity-based penalty (*i.e.*, the amount of the penalty is appropriate based upon the gravity of the violation, whether or not SchoolCraft in fact derives its income from promising clients that it will ensure that they are in compliance with the Asbestos NESHAP). In addition, given SchoolCraft's substantial role in preparing Centerville's asbestos management plan, in drafting the specifications for the abatement project at Cline Elementary and the supervisory role given to SchoolCraft under those specifications, *SchoolCraft I* at 4-7, the Presiding Officer's conclusion is supported by substantial evidence.

good faith was clear error or an abuse of discretion. The evidence cited by SchoolCraft does not inevitably lead to the inference that SchoolCraft acted in good faith. Instead, that evidence could support the conclusion that SchoolCraft knowingly failed to exercise its broad supervisory powers to require Seneca to comply with the Asbestos NESHAP.[16] Accordingly, we find no clear error or abuse of discretion in the penalty analysis[17] and, therefore, uphold the Presiding Officer's assessment of an aggregate penalty of $20,000 against SchoolCraft.

III. *CONCLUSION*

For the reasons set forth above, a civil penalty of $20,000 is assessed against respondent SchoolCraft Construction, Inc., for five violations of the Asbestos NESHAP. SchoolCraft shall pay the full amount of the civil penalty within sixty (60) days of receipt of this final

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[16]SchoolCraft argues that its good faith is established by the comments of its on-site manager, Mr. Jack Bowman, to the effect that he had been concerned about Seneca's failure to comply with the regulations, Transcript at 132-33, and by the testimony of Centerville's representative to the effect that he was "satisfied with Mr. Bowman's attitude with the school district whenever the alleged violations by Seneca were identified. * * * [H]e was very concerned that Seneca did not allegedly follow the rules and regulations of the EPA as required and as he had put into the specifications." Transcript at 93-94. Significantly, none of this testimony addresses the broad supervisory powers that were granted to SchoolCraft under the specifications or what action, if any, SchoolCraft took to ensure compliance with the Asbestos NESHAP. In short, the testimony cited by SchoolCraft could support the conclusion that SchoolCraft was aware of both the applicable standards and the violations, but took no action to bring the project into compliance and only expressed its concern to Centerville and RAPCA after the violations were discovered. Under these circumstances, we cannot conclude that the Presiding Officer's omission of a penalty reduction for "good faith" was clear error.

[17]In upholding the Presiding Officer's penalty assessment, we do not rely upon the Region's argument that the penalty should not be reduced, and might even need to be "heightened," based on the ground that SchoolCraft has been unwilling to take responsibility for the violations as shown by its continued denial of its status as an "operator." Region's Brief at 19, 25.

order, unless otherwise agreed by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

U.S. EPA, Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, Il 60673

So ordered.

SCHOOLCRAFT CONSTRUCTION, INC.